programming for more than 25 percent of primetime or more than 50 percent overall on a weekly basis, then it should be considered "substantially duplicating."

In order to avoid any confusion that may arise, the Commission should also clarify in its Order that, consistent with the Act's language, the requirement to carry the closest network affiliate applies only where an operator has exceeded its cap on the number of local stations. It does not apply, under the statute's terms, where an operator is otherwise choosing between carriage of two affiliates. Congress established separate provisions addressing these two different types of situations, and made the obligations to carry the closest network affiliate applicable in one situation (where the number of local commercial stations requesting carriage would exceed the cap), but not in the other.[37/]

37/ Compare Senate Report No. 102-92, 102d Cong., 1st Sess. at 84 (June 28, 1991) (hereinafter "S.Rep.") (describing that "in situations where there are more local commercial television stations than a cable operator is required to carry, the cable operator will have discretion to choose which of the local commercial stations it will carry, except "it shall carry the closest network affiliate"); with id. at 85 (exempting systems from the obligation to carry the signal of more than one station affiliated with a particular broadcast network, without any limitation).

E. Manner of Carriage.

1. Technical

In paragraph 32 the Commission seeks comments on the content of must carry signals to be carried. Among other things, the Notice asks for proposals on the proper interpretation of the provision that requires operators to carry, "to the extent technically feasible", program related material in a station's vertical blanking interval or on subcarriers. "Technical feasibility" may be affected by the particular characteristics of the equipment used by the system and/or signalling and other types of communications between the system headend and other points along the distribution facility, including subscriber terminals. Whether it is "technically feasible" to carry this information may depend on the type of converter utilized by the system. Some systems may employ certain converters with internal characteristics that may garble this information; other addressable systems may use portions of the VBI or subcarriers to transmit information to addressable converters. These two situations may not describe the entire universe of existing technical difficulties, however. We therefore would suggest that the Commission not define this term with any particularity beyond what the statute states.

2. Channel Positioning

As the Commission recognizes, the differing channel position options granted to local commercial broadcasters may well lead to conflicts among different stations with the statutory right to

occupy the same channel slot. In order to best resolve these conflicts, we endorse the proposal set forth by the Commission[38/] to permit cable operators to make a selection among competing broadcast stations within the constraints otherwise established in the Act.[39/] This approach will minimize the disruption to established viewing patterns, will enable operators to set out logical signal carriage lineups, and will lead to the most expeditious resolution of disputes between broadcasters.[40/]

We also agree that Congress could not have intended that operators provide on-carriage channel slots to broadcasters that operate on channel numbers higher than the number of channels an operator may have on its basic service. In those instances, again, an operator at its discretion should be entitled to place the signal on a channel within its basic service.[41/]

If the Commission determines to prioritize the statutory channel position options, a broadcaster's channel position as of January 1, 1992 should be given the most weight. This option would cause the least disruption to subscribers and operators.

38/ NPRM at para. 33.

39/ In addition, all broadcasters must be required to identify their channel preference as of a date certain to avoid unnecessary confusion for subscribers.

40/ The Commission, of course, under the Act remains the ultimate arbiter of must carry channel positioning disputes.

41/ In fact, unlike VHF stations, UHF stations were never accorded on-channel carriage rights under the FCC's prior must carry rule, due to the technical infeasibility of requiring on-channel carriage.

3. Signal Quality

We agree with the Commission that the Act's concerns about the quality of broadcast signals carried by cable system are satisfied by the FCC's recently-adopted cable television technical standard rules.[42/] In those rules, the Commission adopted requirements to ensure that all classes of channels carried on a cable system -- both broadcast and satellite-delivered -- meet a certain minimum technical quality. There is no need for the Commission to adopt additional requirements applicable to over-the-air signals in the course of this proceeding. Nor should there be, consistent with the thorough examination of these issues accorded broadcast interests during that proceeding, any obligation on operators to enhance the signal received over-the-air.[43/] An operator's obligation under the technical standards rules is to use good engineering practices and proper equipment -- no further obligation should be imposed.

42/ NPRM at para. 35.

43/ Cable Television Technical and Operational Standards, 7 FCC Rcd. at 2024 (finding it not "appropriate to require cable television systems otherwise meeting our standards to improve the quality of any signal received by the system.")

Merely providing a signal at the prescribed strength does not guarantee, however, that a "signal of good quality" is provided. In fact, problems do arise where the quality of the over-the-air signals received by the operator is inferior to other signals presented on the system, even though the signal may be at or above the prescribed signal strength.

F. Procedural Requirements

As the Notice points out, the Act imposes a requirement that operators notify stations at least 30 days before they are deleted from carriage or repositioned. An operator's marketing decision should not be constrained more than absolutely necessary to satisfy the Act's requirements. Thus, we do not believe that the Commission should adopt the further requirement that subscribers be notified where an operator changes its over-the-air lineup.

Undoubtedly, many operators voluntarily will take measures to inform their subscribers of any changes in their service. Furthermore, Section 614(b)(8) specifically requires operators "to identify, upon request by any person," the signals carried in fulfillment of the Act's must carry requirement. Requiring operators to send an additional, costly notice to all subscribers will result in increased burdens on operators, and will serve only to unnecessarily increase the costs of an operator's exercise of its editorial discretion.

For similar reasons, the Commission should confine the prohibition on channel repositioning and deletion to those four sweeps periods identified in footnote 47 of the Notice. While ratings data may be gathered throughout the year, Congress did not adopt a statute that prohibits all channel repositioning or deletions. Rather, the Act contemplates that operators will be making such changes and can best be read to confine the prohibition on these changes to those four sweeps periods.

III. RETRANSMISSION CONSENT

A. Applicability of Retransmission Consent

As an initial matter, the Commission seeks comment on the threshold question of the applicability of the Act's retransmission consent requirement to SMATVs. While the Act does not specifically address SMATVs in its definition of "multichannel video programming distributors", it notes that the definition is "not limited to" those examples contained in the Act.[44/] There is no reason based on the language of the Act or its legislative history why cable television systems, MMDS, and satellite distributors should be required to obtain consent before retransmitting commercial television stations, while functionally equivalent SMATVs should be exempt.

The NPRM also seeks comment on whether retransmission consent rights apply to radio as well as television broadcasters.[45/] While Congress loosely used the term "broadcasting station" in Section 325(b)(1), the entire thrust of the retransmission consent provision is directed toward the exercise of retransmission consent rights by television broadcast stations. The body of Section 325 expressly contemplates television broadcasters making an election between retransmission

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44/ 47 U.S.C. Section 522(12).

45/ The Commission should also make clear that retransmission consent requirements do not apply to those superstations exempt from the Act's requirement based on their satellite delivery (see Section 325(b)(1)(D)) where those stations are delivered to certain subscribers by microwave.

consent and must carry rights. Those must carry rights apply only to television stations. Indeed, we could not locate a single reference to radio broadcasters in the entire legislative history of the retransmission consent provision.

Moreover, as a practical matter, it makes no sense to impose a retransmission consent scheme on cable radio retransmissions. Many operators pick up an entire band of radio signals using a single antenna and process and retransmit those signals in a block. Even if all but one radio station wished to be carried on cable, none would be able to gain carriage if only one station were to withhold consent. Under these circumstances, it would be both contrary to congressional intent and impractical to interpret Section 325 to apply to radio stations.

B. Scope of Retransmission Consent

The Act provides that if there is "more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." Section 325 (3)(B). The "same geographic area" is not defined in the Act. The Commission takes an unduly narrow view of this provision to apply only in the cases where the systems physically overlap. NPRM at paragraph 45. But, we submit, viewed in the context of the retransmission consent and election process as a whole, the "geographic area" should be read broadly to encompass the television station's market -- the ADI.

The entire purpose of granting broadcasters retransmission consent or must carry rights was to give them an opportunity to

decide whether their signal had economic value. It was not the intent of the statute to grant broadcasters a cudgel with which to extort fees from cable operators. To the contrary, Congress directed the FCC to ensure that the rates stations might obtain from cable operators are "reasonable."[46/]

Unless a station's election is applied to all cable systems within an ADI, this statutory mandate would be severely undermined. A station, for example, that chose must carry rights on most surrounding systems in an ADI would gain tremendous bargaining leverage over the remaining systems for which the station chose retransmission consent. Those systems would be faced with the possible prospect of acceding to the broadcaster's hold-up demands, no matter how unreasonable, or being forced to delete those broadcast signals from their broadcast service tier without regard to subscriber interest in receiving those signals. In either situation, cable subscribers would be ill served. Shifting from a world of mandatory carriage to one in which marketplace forces set the rules requires an initial regulatory even handedness. That would not be the case where broadcasters can manipulate the protections of mandatory carriage to leverage their side of retransmission consent negotiations. The only way to protect against broadcasters obtaining this unintended

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46/ Section 325(b)(3)(A) (requiring Commission to ensure that regulations under retransmission consent do not conflict with obligation to ensure that rates for basic service are reasonable).

negotiating tool is to ensure that their election applies throughout their ADI.

C. Implementing Retransmission Consent

The statute has established a must carry and retransmission consent scheme that is inextricably linked. The combined effect of these new requirements may lead to a rearrangement of the broadcast signal complement that cable viewers have come to expect. The Commission must adopt an election and transition period that enables changes necessary to accommodate both requirements to be accomplished as smoothly as possible. Operators must have sufficient time to negotiate with broadcasters electing retransmission consent, to determine whether to delete or add broadcast signals or cable program services, to provide the requisite notice to broadcasters and to inform subscribers of any changes in their program service. At a minimum, operators will need 90 days to complete these many tasks.

We recognize, however, that the FCC's rules will not be in place until April 1993. Decisions about signal carriage, however, must be made by July 1, 1993 in order to avoid copyright liability for carriage of stations that are distant signals for copyright purposes for an entire accounting period. Thus, we would propose that for the inception of these obligations, the Commission should establish an election deadline on the effective date of its rules, or June 1, 1993, whichever is earlier. This election would be effective on October 6, 1993. While this would

provide operators with less than three months in which to conduct the initial retransmission consent negotiations with distant signals, it would enable operators to avoid paying a penalty in copyright fees if those negotiations were unsuccessful and a distant signal had to be dropped.[47/]

An early deadline for choosing between must carry and retransmission consent is warranted for several reasons. First, broadcasters already are fully aware that an election will need to be made, and have been preparing for this eventuality ever since the Cable Act became law.[48/] Second, it would facilitate a smoother transition to the new signal carriage regime. As paragraph 48 of the Notice points out, the must carry requirements of the Act mandate that the Commission issue implementing regulations by April 3, 1993. The Commission appears to contemplate making those must carry rules effective prior to requiring stations to make an election between must carry and retransmission consent. The public interest would be best served if only a single rearrangement of service offerings

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47/ Subsequent elections should be made by April 1, with a July 1 effective date.

48/ The National Association of Broadcasters, for example, reportedly has been conducting seminars to prepare stations for making this choice and conducting negotiations. see Communications Daily, Nov. 30, 1992 at 4 (describing NAB seminars).

were necessary.[49/] Otherwise, an operator may be required to change channel lineups in advance of October 1993, and then, depending on the outcome of the election and retransmission consent negotiation process, make yet another adjustment to its service complement just a few months later.[50/]

Finally, the Commission should make clear that all elections must be made on a single date, and that retransmission consent negotiations between a local station and system cannot take place until that election is made. Otherwise, broadcasters would obtain an upperhand in those negotiations and gain unequal bargaining leverage. If negotiations were not going well a station could simply opt for must carry status instead. This could not be what Congress intended in requiring that an election be made.

49/ The Commission in para. 51 seeks comments on the effect of a station's failure to make an election. In such circumstances, carriage should be at the discretion of the operator. In addition, the operator during the three year election period should be able to delete carriage of the station at its option.

50/ Besides the technical adjustments to channel lineups, changes in carriage arrangements will directly impact rates for cable service. This could be especially troubling during the initial phases of local rate regulation, particularly where repeated changes could trigger additional proceedings.

D. Retransmission Consent and Must Carry Signal Complement

The Commission tentatively concludes[51/] that local broadcast signals carried under the retransmission consent provision would count toward the "cap" on the total number of local commercial signals that an operator must carry. We agree with this conclusion for several reasons. First, as the Commission points out, the Senate Report quite clearly evidences the intent that this should be the case.[52/] Second, to find otherwise would lead to an even greater burden on operators' and programmers' First Amendment rights than the Act purports to require. If retransmission consent signals were not included in the cap, operators would inevitably be required to carry all local signals. Those stations with little appeal to cable subscribers would likely opt for mandatory carriage; those that operators desired to carry would likely choose retransmission consent. In this regard, the rules would leave operators little or no discretion, requiring carriage of virtually every local commercial broadcast station.

Such an outcome cannot be squared with Congress' insistence that the new signal carriage rules "are not overly broad."[53/] According to the Senate Report: "[T]he signal carriage regulations do not excessively restrict cable operators'

51/ NPRM at para. 54.

52/ S. Rep. at 37-38, 84.

53/ Id. at 61.

discretion. The obligation to retransmit the signals of local commercial television stations is limited to only one-third of a system's usable channel capacity, leaving the majority of the signals to be programmed as the cable operator wishes and ensuring that cable programmers have ample opportunity to have their programs carried." Id. Thus, there is clear evidence that Congress intended operators' signal carriage burden to be limited to the "cap" set forth in Section 614.

There is equally strong support for the Commission's conclusion that the other provisions of Section 614, such as channel positioning, manner of carriage, and carriage of non-program aspects of a local broadcast signal, do not apply to signals carried under the retransmission consent provision. This interpretation is not only consistent with the language of the statute itself,[54/] but is also firmly grounded in the legislative history of the retransmission consent provisions as well.

That legislative history evidences Congress' intent that stations would not automatically be granted the statutory benefits contained in Section 614, but instead would bargain for these provisions with cable systems. As the Senate Report describes:

> Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system will thereby give up its

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54/ Section 325(b)(4) states that if a station elects retransmission consent, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system."

> rights to signals carriage and channel positioning established under Section 614 and 615 for the duration of the three-year period. Carriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system.

S. Rep. at 37 (emphasis supplied).[55/] This legislative history further suggests that stations opting for retransmission consent forfeit all the must carry protections contained in Section 614. Thus, in addition to those provision identified by the Commission (such as manner of carriage, channel positioning, ban on compensation, and repositioning) operators with more signals than their cap would be free to choose which local network affiliate to carry if an affiliate opted for retransmission consent. The retransmission consent provision, if nothing else, means that the terms and conditions of a station's carriage are entirely a matter of negotiation between the station and system.[56/]

55/ See also 138 Cong. Rec. S.14224 (Sept. 21, 1992) (retransmission consent means a station may "negotiate with the local cable system over the terms and conditions of its carriage on the system.") (Statement of Senator Inouye); 138 Cong. Rec. S.562-3 (Jan. 29, 1992) (stations choosing retransmission consent "may negotiate for money or for non-monetary consideration, such as channel position.") (Statement of Senator Inouye).

56/ Subject, of course, to the limitation that a station may not negotiate for a channel position to which another must carry station is entitled. Section 325(b)(5).

In addition, most broadcast signals carried based on Section 623 of the Act would be assured carriage on the basic tier. Stations opting for retransmission consent, therefore, would maintain a preferential channel position over all other cable program services.

E. Retransmission Consent Contracts - Network Non-Duplication

The Commission seeks comments on whether Section 76.92, which requires operators to carry the programs of television broadcast stations in full, without material degradation or without deletion or alteration of any portion of the program broadcast, would continue to apply to signals carried under retransmission consent. We believe it should not, nor should other provisions of the FCC's rules, such as network non-duplication.[57/]

Application of the network non-duplication rules to retransmission consent stations is entirely inappropriate in light of the new rights that Congress has given broadcast stations. Network non-duplication is an outmoded concept in an era of retransmission consent. A television station under the 1992 Act is given a tremendous competitive advantage in being able to force operators to carry its signal under prescribed terms and conditions, and without compensation, under the must

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57/ The extent to which the entirety of a broadcast day will be carried, and in what manner, should be part of retransmission consent negotiations. While we agree with the Commission's conclusion that operators may decline to carry the entirety of a broadcast signal carried pursuant to retransmission consent, the Commission should not adopt a requirement that some minimum quantum of carriage of the station's programming is necessary in order to have that station count toward the system's "cap". The Commission should not adopt rules that would essentially dictate the amount of programming that need be carried. Regardless of the amount of programming carried, a station still would be occupying a channel on the basic tier.

carry provisions. If a station opts to voluntarily forgo that advantage and take its chances in the marketplace in order to bargain with an operator over its carriage, that bargaining should not be even more unfairly weighted in favor of the broadcasters. We can conceive of no public interest rationale for the Commission to step in on the broadcaster's side of the bargaining table.

Several existing FCC rules, however, grant precisely this leverage to broadcasters in what should be a marketplace negotiation. The network non-duplication rules are a prime example. A network affiliate is automatically granted the right, under separate FCC rules, to require a cable system to blackout duplicating network programming on a more distant affiliate carried on the system. Indeed, under the FCC's most recent network non-duplication rules, affiliates may assert blackout rights against more distant stations even if they are not carried on the system.[58/]

If a retransmission consent station automatically could exercise non-duplication rights over any other network affiliate an operator might carry, the very threat of denying subscribers access to network programming would grant the station tremendous bargaining leverage. Not only would the public interest be ill-served by allowing stations to deny such programming to

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58/ See Program Exclusivity in the Cable and Broadcast Industries, 64 R.R. 2d at 1845.

viewers, but the marketplace also would not function as the statute envisioned.[59/] Whether or not non-duplication rights are granted should be a matter of agreement between the system and the station seeking retransmission consent, not a result of government fiat. If a station is interested in such protection, rather than the free market, it may automatically obtain it -- simply by electing must carry rights.

F. Program Exhibition Rights and Retransmission Consent

The imposition of retransmission consent holds the potential to disrupt tremendously operators' ability to provide both local and distant signals to their subscribers. With respect to local signals, of course, a station that wishes to be carried may by-pass the need to expressly grant consent by opting for mandatory carriage. But with respect to distant signals, no such choice is available. Thus, depending on how it is implemented, imposing retransmission consent could lead to a wholesale displacement of signals that subscribers, especially those located in underserved or rural areas, have long enjoyed.[60/]

59/ As the Senate Commerce Committee described, "it is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals, it is not the Committee's intention in this bill to dictate the outcome of the ensuing market negotiations." S. Rep. at 36 (emphasis supplied).

46/ As the Commission correctly points out in para. 61, the Copyright Office's policy of requiring full payment for each distant signals carried, even if only a single program is carried, could act as a further disincentive to carriage of distant signals.

The cable industry throughout the legislative debate over retransmission consent has argued that the concept of requiring operators to obtain broadcasters' consent is wholly inconsistent with the compulsory license. Nevertheless, Congress rejected this argument and adopted a provision that can best be read as one that expressly grants broadcasters an interest in their signal separate and apart from the underlying programming. The right to retransmit the programming contained in that signal has been governed, and continues to be governed, by the copyright compulsory license -- a right that Congress has expressly left unchanged. The best way to reconcile the compulsory license and retransmission consent, therefore, is for the Commission to adopt the interpretation that operators need only obtain from stations the right to retransmit their signal.[61/]

Broadcast stations must be able to freely grant this retransmission right. This should be the case regardless of whether a program contract is silent, or affirmatively grants

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61/ This view is consistent with prior interpretations of Section 325(a) which provides that no broadcasting station shall "rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." See, e.g., Board of Commissioners, Monroe County, Florida, 45 R.R.2d 1365, 137 (1979) ("All that is required by Section 325(a) is that consent be obtained from the originating station. Neither the statute nor our rules require the consent of anyone else."); Blair B/casting of California, Inc., 48 R.R.2d 1551, 1554 (1981) ("The Commission has consistently held that Section 325(a) only requires that rebroadcast consent be obtained from the originating station.")

permission to the station to authorize cable retransmission of the subject programming, or affirmatively denies such permission.

The language of the statute is not to the contrary. Section 325(b)(1) provides that "nothing in this section shall be construed as modifying the compulsory copyright license..., or as affecting existing or future video programming licensing agreements between broadcast stations and video programmers". The Commission suggests that the licensing agreement language could be read to mean that retransmission consent rights can be superseded by the express language of an agreement. Interpreting the provision in this manner, however, would enable programmers to engage in an end run around the compulsory license. It would give programmers a veto over the exercise of cable operators' rights to retransmit broadcast programming under the compulsory license -- a licensing arrangement specifically designed to allow broadcast retransmissions without the consent of copyright holders. Such an interpretation cannot be squared with Congress' express intent not to alter the workings of the compulsory license.

This language on licensing agreements, then, can best be read to mean that program suppliers are free to contract with stations to obtain compensation, as part of their program license, if the station authorizes cable systems to retransmit its signal. Moreover, this clause protects program suppliers should Congress repeal the compulsory license; program suppliers under this provision could then require stations to withhold consent to the retransmission of particular programs. But

program suppliers -- either network or syndicators -- may not restrict a station's ability to authorize the retransmission of its signal by cable systems.

CONCLUSION

On the basis of the foregoing, NCTA urges the Commission to adopt rules consistent with the comments submitted herein.

Respectfully submitted,

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